Negotiation and Mediation of Environmental Disputes

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I. INTRODUCTION

I have been asked to glean a few lessons from the environmental experience that have general application to the negotiation and mediation of complex issues. That assignment is somewhat difficult because the environmental movement started less than two decades ago. That short history has been characterized by inequality of power, distrust, and polarized positions — all being factors that are not conducive to negotiated settlements. Nevertheless, a successful environmental mediation movement has emerged in the United States, and its exponents claim substantive success. Gail Bingham, a prominent environmental mediator, notes in her forthcoming treatise that 160 major environmental disputes have been mediated during the last decade, and there are now environmental mediation services available in 13 states, the District of Columbia, and Canada.[1]

Significant limitations apply to these dispute resolution approaches. I believe that an understanding of these limitations will lead to a better appreciation of the notable successes of dispute resolution efforts. An appropriate beginning may be to discuss these limitations. The initial limitation is the myth that alternative methods are always easier than conventional resolution methods, and that all controversies can be settled outside of the courthouse. Finally, the history of the environmental movement presents special problems for a process that is based on mutual trust.

II. ENVIRONMENTAL DISPUTES SUSCEPTIBLE TO MEDIATION

Many individuals misperceive negotiation and mediation as substitutes for litigation. This belief has led to the frustration of many a sanguine negotiator because basic fallacies underlie that premise. Contrary to popular theory, litigation may often be more time and cost efficient than negotiation for the resolution of public

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1. G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES (1985) (to be published by the Conservation Foundation in Fall, 1985).

disputes. Endless convocations of parties with doubtful mandates that may achieve questionable understandings are not necessarily a superior method to the final judicial resolution of an issue.

The parties may never reach the negotiating table unless litigation reveals that without negotiation the resolution of problems will be delegated to a disinterested third party.

Aside from a disinclination to have important matters taken out of one's control, a further motivating factor for using traditional dispute resolution is that the balance of power, or at least the perception of that balance, can be altered through litigation. This is frequently recognized in environmental disputes. Some examples may illustrate this point. First, a non-negotiating developer may become an earnest negotiator after a critical permit has been judicially remanded to the permitting agency as the result of a successful lawsuit. Similarly, an industrial waste discharger who has spurned the government's efforts to resolve a dispute will become amenable to a negotiated settlement once the government has demonstrated its resolve to protect the public interest by vigorously pursuing enforcement litigation.

Public disputes involving environmental issues create unique problems for negotiation. Government agencies can be extremely resistant to meaningful negotiation. The agencies are often incapable of responsible negotiation due to their bureaucratic structures which diffuse responsibility. Public agencies are often not responsive to relatively unorganized public interest groups because their responsibility is to establish political power. In environmental disputes, the public interest is often advanced by ad hoc citizens' groups with little established political power. Litigations resulting in media attention or procedural victories allows these groups to acquire the requisite status to warrant the agencies' meaningful attention.

Environmental disputes are usually between established organizations with substantial resources and ad hoc organizations whose power arises from protest and confrontation. These ad hoc groups may only achieve status sufficient to trigger meaningful negotiations once they have obtained recognition through litigation. In these situations, the power relationship is temporal. The ad hoc organization would lose its power if it entered into negotiations too quickly. Therefore, these groups can negotiate fairly in the context of some adversarial proceeding.

The mastery of facts and applicable procedural constraints is no less demanding in the negotiating context than it is in litiga-

tion. To the extent that potential negotiators ignore this principle, they court disaster. In many forms of litigation, factual ignorance can be masked behind formal and procedural facades. There are no such protections when the parties face each other across the negotiating table. Environmental disputes tend to have complex factual predicates, and the failure of the parties to master the facts leads to misunderstanding and failure. Negotiation of such disputes does allow the parties to dispense with the formalities associated with litigations and to concentrate their energies on the difficult factual questions.

III. CERTAIN DISPUTES ARE NOT SUSCEPTIBLE TO ALTERNATE METHODS

There are certain types of environmental controversies that do not lend themselves to negotiation and mediation. These controversies are important because environmental, governmental, or industrial interest groups may decide that the environmental impact, precedential value, or symbolism of the dispute justify the expense and effort of a courtroom confrontation. Many environmental disputes thus have importance to adversaries far beyond the immediate resolution of the present dispute. This is particularly true in environmental areas where a judicial resolution of a particular dispute is desired for its effect on the developing law. Similar analogies appear in other fields. For example, management in the labor field may position itself to withstand a strike because it is more important to convey a long-term message than to negotiate an immediate but temporary resolution.

Certain environmental disputes do not lend themselves to a negotiated resolution for a number of reasons. Foremost is the inequality of power between interested parties. A negotiated solution is not likely when one side has the power to achieve unilaterally its objectives without substantial cost. A variation on this theme occurs when a party believes that a resolution is not desirable because that party thinks it benefits from the passage of time. This is not an uncommon situation in many environmental disputes.

It appears that a substantial number of environmental disputes are appropriate for mediation. This fact is evidenced by the increasing prominence of dispute resolution methods in environmental affairs.[2] These efforts have and are continuing to succeed in a

2. Bingham notes:
In addition, and relatively recently, the practice of environmental dispute resolution has

field characterized by distrust, opposing views, and rhetoric that exacerbates the controversy.

IV. THE EMERGENCE OF ENVIRONMENTAL ISSUES

If mediation and negotiation have gained a foothold in the environmental field, these same processes may thrive in other areas. To understand this contention, I would ask you to review the history of the environmental movement. Although Americans have been actively concerned about the environment since the days of Theodore Roosevelt and Gifford Pinchot, the modern environmental movement arose out of an almost revolutionary awareness that we had been despoiling our own nest for too long. Early efforts that were made at conserving our natural resources were forgotten as the United States moved through the Second World War, the Cold War, and industrial expansion. However, in the 1960s the public became aware of the problematic situation created by our industrial expansion and movement towards consumer orientation. This awareness can be traced to three interesting phenomena.

The first is Rachael Carson's publication of her book *Silent Spring*[3] in 1962. By reading this book, Americans became aware that they had poisoned the environment with DDT, and more importantly, that something fundamental had gone wrong. The second event was the public and judicial fight over Storm King Mountain. This incident gave more shape to the forthcoming battles over the environment than any other single controversy. Storm King Mountain dominates the gorge of the Hudson River Valley, which is one of the great natural beauties of America. In 1962, Consolidated Edison (Con Edison), a New York public utility, decided to build an electric generating facility on the face of the mountain. The affluent members of the Hudson River Valley community banded together to attack the proposed project. The forum that gave these conservationists their penultimate victory was the United States Court of Appeals for the Second Circuit.[4] This

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grown beyond the resolution of disputes on a case-by-case basis to the institutionalization, by statute, of procedures for resolving environmental disputes. Statutes in Massachusetts, Rhode Island, Virginia, and Wisconsin authorize or even require negotiation of hazardous waste facility siting disputes. A statute in Virginia specifies procedures for negotiation and mediation of intergovernmental disputes triggered by annexation proposals; in mid-1984, the Pennsylvania legislature was considering a bill that would authorize mediation of any local land use or zoning dispute.

Id. Executive Summary at 3.

3. R. CARSON, SILENT SPRING (1962).

4. *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965); 453 F.2d 463 (2d Cir. 1971).

historic victory obtained by these litigants forced administrative agencies to take into account environmental factors when evaluating proposed projects. The third event was the series of battles that arose from efforts to dam the free flowing western rivers.[5] These efforts were fought in the media, the halls of Congress, and the courts.

In the 1960s, environmental groups that were originally private regional clubs sought to obtain power by transforming themselves into national organizations that could influence decisions through dominance of the media, increased political activity, and lawsuits. The quest for the power necessary to influence environmental decisions triggered a hostile reaction from the political, bureaucratic, and corporate establishments. The establishments' arrogant reaction to these early environmental efforts, caused by their lack of sensitivity to this revolutionary movement, actually increased the power of the new environmentalists. The concomitant loss of power was not accepted graciously because the establishment believed that their power to control environmental decisions had eroded due to the environmentalists' unfair manipulation of the media, cavalier treatment of facts, and marked tendency to disregard the scientific processes. Accordingly, an aspect of the late 1960s and the early 1970s was a lingering distrust between the environmentalists, the regulated community, and the bureaucracy.

Before mutual confidence could become a reality, the political process began to take on a life of its own. Senator Edmund Muskie ushered the Clean Air Act through Congress in 1970. By the end of the decade, the country had a number of comprehensive environmental statutes[6] and a massive environmental bureaucracy to protect the interests espoused by earlier conservationists. Legislation created new vested interests and accompanying suspicions. By the late 1970s, a semblance of understanding and cooperation began to develop between the various elements. However, in 1980 the Reagan Administration, working under the impression that American society did not have a strong concern for the environment, began to destabilize this new relationship. The Administration's attempt to weaken the environmental agencies and to roll back the environmental standards has revived many

5. *See, e.g.*, Udall v. Federal Power Comm'n, 387 U.S. 428 (1967).

6. *See, e.g.*, Clean Air Act, 42 U.S.C. §§7401-76 (1982); Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6987 (1982); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§9601-9657 (1982); Clean Water Act, 33 U.S.C. §§1251-1376 (1982).

feelings of distrust and animosity.

Despite the rhetoric associated with years of vigorous environmental controversies, some rudimentary form of compromise, the essential ingredient of mediated disputes, has long been an aspect of the environmental process. For example, an applicant for a wastewater discharge permit will tailor that permit's parameters to an understanding that has evolved from the informal give and take between the applicant and the administrative agency regulating such discharges. Similarly, a developer will tend to shape a proposed project to the articulated demands of community opponents.

Professional mediators in the environmental area have benefited from the natural tendency of parties to compromise, which may be a more predominate factor than the attendant rhetoric. Environmental mediators have obtained a fair degree of success because they have had the ability to diffuse strong feelings and persuade parties that mutual benefits can be achieved despite their heritage of distrust.

V. Two Illustrative Environmental Mediations

I would like to examine two environmental mediations that are useful as illustrative studies. One is the mediation that settled the Storm King dispute. The second is the Westway mediation which failed.[7]

I have already alluded to the Storm King dispute. The Westway dispute concerned New York's crumbling road structure and a crumbling mass transit structure, both of which compete for federal funds. These transportation interests clashed over efforts to build a massive interstate highway (Westway) along Manhattan's Hudson River. Development of Westway has been supported by real estate interests, government officials interested in road transportation, and certain organizations that believe a good road network is needed to support growth. Westway has long been bitterly opposed by environmentalists. The anti-Westway groups contend there might be a need for a better road, but not the massive road contemplated by the proposal. These groups alleged that money earmarked for Westway could be better spent for an improv-

7. *See generally* A. Talbot, Settling Things, Six Case Studies in Environmental Mediation (1980); L. Lake, *Mediating the West Side Highway Dispute in New York City*, in Environmental Mediation, the Search for Consensus (1980). A significant amount of my discussion of the Storm King and Westway disputes is based on personal knowledge and experience.

ed mass transit system.

The groups opposed to, and those in favor of, Westway all appeared to have a community of interest. They agreed that New York City needed better mass transit and better roads. They agreed that there were limited federal and state sources to fund these means of transportation. It was not surprising that in 1974 an attempt was made to mediate this ongoing dispute. A skilled mediator from an established mediation organization was hired. The conveners of the mediation invited a broad spectrum of proponents and opponents to participate in the mediation process. The proponents of the Westway project not only included representatives of the various economic interests, but a substantial number of highly qualified highway experts. The numerous opponents of the project consisted primarily of community planning boards and citizens groups interested in clean air, mass transit, and the impact of the proposed project on their neighborhoods. A problem occurred when a broad spectrum of individuals and groups were not invited or chose not to participate in the mediation. These included the state's governor and the city's mayor, both important decision makers. Approximately thirty-eight individuals representing twenty-three groups participated. The mediator was clearly recognized as a neutral outsider, and not beholden to any group. Nevertheless, that mediation, despite an apparent community of interest, failed to resolve the dispute, which is still ongoing.[8]

The Westway effort should be contrasted with the major dispute between Con Edison and nine other utilities along the Hudson River. In 1979, the then Chairman of the Board of Con Edison decided that matters had gone too far; the controversy had spread from the proposed Storm King Project to the nuclear and coal fired existing plants along the Hudson. The federal government wanted the utilities to build giant cooling towers because the plant water intakes were allegedly destroying the natural fishery of the Hudson. Some environmental groups were in favor of cooling towers, some were opposed to them. Members of the state government opposed cooling towers because such towers would mar the beauty of the Hudson River Valley. Eventually, there were nineteen parties to this successful negotiation and mediation.

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8. *Sierra Club v. United States Army Corp of Engineers*, Nos. 85-6297, 85-6299 (2d Cir. Sept. 18, 1985) (available on LEXIS, Genfed library, US App file) (upholding the district court's denial of a landfill permit to continue Westway; and reversing the permanent injunction against the project, remanding the matter to the federal agencies for appropriate action).

Why did one mediation succeed while the other failed? It is believed that the Westway negotiations failed because, despite his impressive skills, the mediator was unable to obtain basic agreement with respect to the fundamental data. Moreover, those proponents of Westway who were highway experts were perceived as being unwilling to consider the "soft" policy issues advanced by the project's opponents.

One commentator has observed:

> The mediation experiment was an attempt to compensate for a faulty participatory process. However, the agenda for the mediation group was developed by the highway planners: it was an agenda of highway designs developed by "professional high priests". It was not surprising then, that the citizen intervenors were unprepared to select a highway design, and instead wanted to discuss the equity of the interstate plan and social goals which required a binding land-use plan. They found that in order to address those goals they had to initiate litigation . . . .[9]

Most importantly, it was perceived that the real parties in interest, the governor and the mayor, were not at the negotiation table. Further, the real estate interests, and some significant newer public interest groups, were also absent from the table. Some of the people who were at the table were primarily interested in the resolution of broad public issues and were not present because the road would immediately impinge on their lives. They believed the law should not permit this type of development and their presence was to establish principles that would further the reduction of air pollution and congestion.

Another factor that apparently contributed to the Westway impasse was the perception on both sides that victory was attainable. Westway proponents believed that the opponents of the project were politically weak and would eventually have no input into the decision. The Westway opponents realized their weakness but believed they had enough power to block the project through delay. The process was further exacerbated because there was no time frame and no time pressure. No party faced a strike deadline or commencement of a trial. Commentators have also suggested that mediation will fail, as it did in the Westway project, when one party perceives that delay favors its position.

In the Storm King mediation, all parties believed that settlement was needed and that time was running out. Fish were being entrapped and killed; the government was going to move forward

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9. L. LAKE, *supra* note 7, at 227.

and require cooling towers; and there were ongoing administrative proceedings.

The Storm King settlement was a major achievement. The parties achieved their goals of protecting the environment and providing for the generation of electricity.[10] The mediator was Russell Train, former Undersecretary of Interior, judge, and administrator of the Environmental Protection Agency. One reason for the success of the mediation must be attributed to the stature of the mediator and the respect he achieved from both the regulated community and the environmentalists.

In his analysis of how settlement was accomplished, Train has said that he made sure that he negotiated the ground rules first. In certain settings such as industrial relations, the basic framework for the negotiation is well established. Each side knows who is on the opposite side of the table and what each wants. This is not the case in environmental negotiations. It is often difficult to discern not only who the parties are, but which negotiation procedures will be utilized.

One of the first things established by the mediator in the Storm King dispute was that there would be no press releases or statements to the media other than those made by the mediator. Train also made sure that all parties who could affect a decision were at the table, and that those at the table could speak for and bind the groups they represented. Interestingly, Train found that the government was the stumbling block, and the polarizing factor was the federal Environmental Protection Agency. It was difficult to get the government to come up with clean, tight decisions, and assurances that its position during the mediation process would be given effect.

A special and very important effort was made to adopt a common data base that could receive general agreement. Eventually, parameters of commonly acceptable data and commonly accepted areas of disagreement were negotiated. Finally, all parties, including the generally intransigent government agency, displayed a willingness to compromise, to make good faith offers, and to consider counteroffers. This sustained and controlled negotiation process led to a remarkable and much heralded settlement.

VI. LESSONS TO BE DRAWN FROM ENVIRONMENTAL DISPUTES

I would like to draw from these examples the factors necessary

10. *See* A. TALBOT, *supra* note 7.

to achieve a negotiated settlement in such complex disputes. It is not difficult to mediate a dispute where two people want to settle a matter which both sides understand and can reduce to manageable terms. If one can get the parties in the same room, they will work things out. However, it is a task of a different magnitude when the facts are complex and there are strong interests competing for diverse solutions. In this latter category, it is important to have a competent mediator whom the parties regard as neutral. A mediator is necessary because many disputes of a public nature do not have a well-defined format, and there is a need for a neutral party to start, structure, and control the negotiating process.

An environmental mediator must often do a considerable amount of pre-negotiation leg-work. The reputation that the mediator brings to the process will be of great assistance at this point. The mediator's initial task may be to ensure that all the parties who can influence the decision are at the conference table. The negotiation of environmental and similar public disputes is often complicated because of the absence of critical parties from the bargaining table. A collorary of this problem is that the parties present may not be truly representative of their constituencies and will be unable to deliver once the deal is struck. These problems arise from the unstructured nature of environmental disputes, and often from the amorphous nature of the disputants. Careful attention and time must be allocated to these problems by the negotiating parties and the mediator. Efforts must be made to bring in the missing parties, or to structure the settlement to minimize disruptions from the missing parties.

The mediator must be assured that all parties will abide by the ground rules that are established. The ability of the negotiating representative to deliver on the commitment of the represented group after a deal has been completed should be explored and tested prior to the completion of negotiations. Representatives of amorphous or bureaucratically structured organizations should be given sufficient time to conduct their internal vertical negotiations.

There are certain prerequisites to a successful negotiation that transcend the need for a competent mediator and may only become apparent to the parties through the assistance of a skillful neutral party. As indicated above, an important prerequisite to successful negotiation is the perception of the parties that they lack the unilateral ability to affect the outcome of the dispute without incurring great costs. A necessary role of the mediator is the relative-

ly limited one of helping a party recognize some of the real costs it faces if the matter is not resolved through negotiation. This is often the case in environmental disputes, where parties may be unaware of relatively new environmental statutes and their judicially enforced constraints. Environmental conflicts, like other public disputes, are often between established groups that are unwilling to recognize the threat posed by ad hoc groups advocating new concepts. Certain parties simply may not be interested in resolution, and there may be no incentive for them to participate in a process which has as its objective a negotiated resolution to the dispute. The mediator may wish to isolate such participants from the mainstream of the proceedings. It is difficult to conceive of a successful negotiation where major participants see fewer benefits in a settlement than in no settlement.

Another important requisite in achieving a negotiated settlement is that the parties must stop talking about their positions and start talking about their interests. In environmental disputes there is often a knee-jerk reaction to espouse the company line. The mediator should assist the parties to focus on their real interests, and then see if these interests can be matched. The mediator may attempt to accomplish these last two objectives in separate meetings with the parties.

Once these two requisites have been met, the mediator can proceed with other important tasks that will lead to a negotiated solution. It is axiomatic that the mediator must attempt to build trust between the negotiating parties. That is a very important task in resolving disputes such as those involving environmental issues, when the parties may have a long tradition of mutual suspicion and distrust. The skilled mediator will encourage the parties to make intermediate concessions that will assist in the building of trust.

The inequality of information is particularly relevant to disputes involving complex or scientific facts. Environmental disputes are often characterized by one side controlling the technical data. Where the environmental problem is not particularly complex, or the competing party has comparable resources to produce the needed data, this unequal distribution of power is lessened. However, in many environmental disputes, data can only be obtained at great expense and scientifically analyzed at even greater expense. The party with control of data has the power to unilaterally influence the dispute. This party is often reluctant to share such data with an adversary because it would create the

equalization of power and would decrease the ability to unilaterally affect the dispute. This often means that the governmental agency, the project developer, or the member of the regulated community may continue to have superior power.

Inequality of power does not lend itself to a negotiated settlement because it discourages the party with power to avoid meaningful negotiations, and works against the building of mutual trust. A major task of the mediator is to deal with this inequality of information, and in effect, inequality of power. A careful distinction should be made between the sharing of data and the revealing of expert testimony. A party should not be expected to reveal the latter category of information. The trade-off for revealing base data may be the agreement of the other side to reveal its objections to the validity of the data. The party with the data must understand that the price of a negotiated settlement may involve concessions of information held by that party. This may require the mediator to structure interim settlements on the pooling of information.

Parties must also reach agreement regarding basic facts. The parties may choose to disagree on the probable consequence of those facts, but unless they can agree on some baseline, the prospects for settlement will be small. The mediator must take particular care to ensure that the negotiators do not become captive audiences to competing experts. The presentations of the technicians and experts should be carefully controlled. In analagous instances, caution has been advised against the impulse to give an unfettered choice among competing policies "greater sanctity by embodying it in the seeming objectivity of an 'expert discipline.' "[11]

A final lesson which can be drawn from environmental disputes is that the mediator must be respected by all parties. All parties must believe in the mediator's impartiality. A successful environmental mediator must be able to diffuse the legacy of the revolution — a distrust of the other party's motivations.

VII. CONCLUSION

I hope that these comments are useful and that there is agreement that mediation and negotiation arising from different fields have certain common prerequisites. The lessons gleaned from the environmental area do have application to most other areas of

11. L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 580 (1965).

dispute resolution. Above all, it must be understood that the process of mediation in difficult situations such as environmental conflict is not mechanics, but art.